

Water Rights



IC 14-25-16-2

Task force established; purposes; reports



Water Resources Task Force Purposes (IC 14-25-16-2):

(a) The water resources task force is established to study and make recommendations concerning the following issues with a focus on water availability as an economic and environmental necessity:

- (1) Available quantities and sources of water.
- (2) Future needs.
- (3) Resource management.
- (4) The determination of ownership rights, particularly in ground water.
- (5) Drinking water delivery systems.
- (6) Opportunities to work with neighboring states concerning shared drinking water resources.
- (7) Other related issues....

Four basic categories of water sources recognized by Indiana common law:



A. Surface Water in Channels: Surface water that flows in a permanent, distinct, and well-defined channel from the lands of one owner to those of another (sometimes called a “watercourse”) or that form permanent bodies on the surface (such as a “lake”). By rule, the NRC has defined “waterway” to include both watercourses and lakes.

B. Dispersed Water: Surface water where a channel is lacking, historically sometimes called “wild waters”, which temporarily flow upon or near the earth’s surface.

C. Underground Streams: Ground water in a subterranean stream which flows from the lands of one person to another.

D. Percolating Ground Water: Ground water lacking a defined channel which may filter from the lands of one person to another.

A. Surface Water in Channels (Ownership: Riparian Doctrine)

Water in a waterway is governed by riparian doctrine, the system of law dominant in Great Britain and in the Eastern United States. Under riparian doctrine, the owner of lands along a waterway has the right to reasonable use of the water, and a correlative right protecting against unreasonable use by others. Each riparian owner “has an equal right to the flow of the water through his land, and no one has a right to use it to the material injury of those below him.”

Dilling v. Murray, 6 Ind. 324, 327 (1855).



A. Surface Water in Channels (Bundle of Rights: Riparian Doctrine)

Under riparian doctrine, water ownership is just one of a “bundle of rights” enjoyed by a riparian owner. In particular along a public waterway, a riparian owner has rights correlative to other riparian owners and to the public as a whole for the following:

1. Access to the public waterway
2. Wharfing out
3. Use of accretions
4. Reasonable use for purposes such as boating and water consumption



Parkison v. McCue, 831 N.E.2d 118, 128 (Ind. App. 2006).

B. Dispersed Water (Common Law)

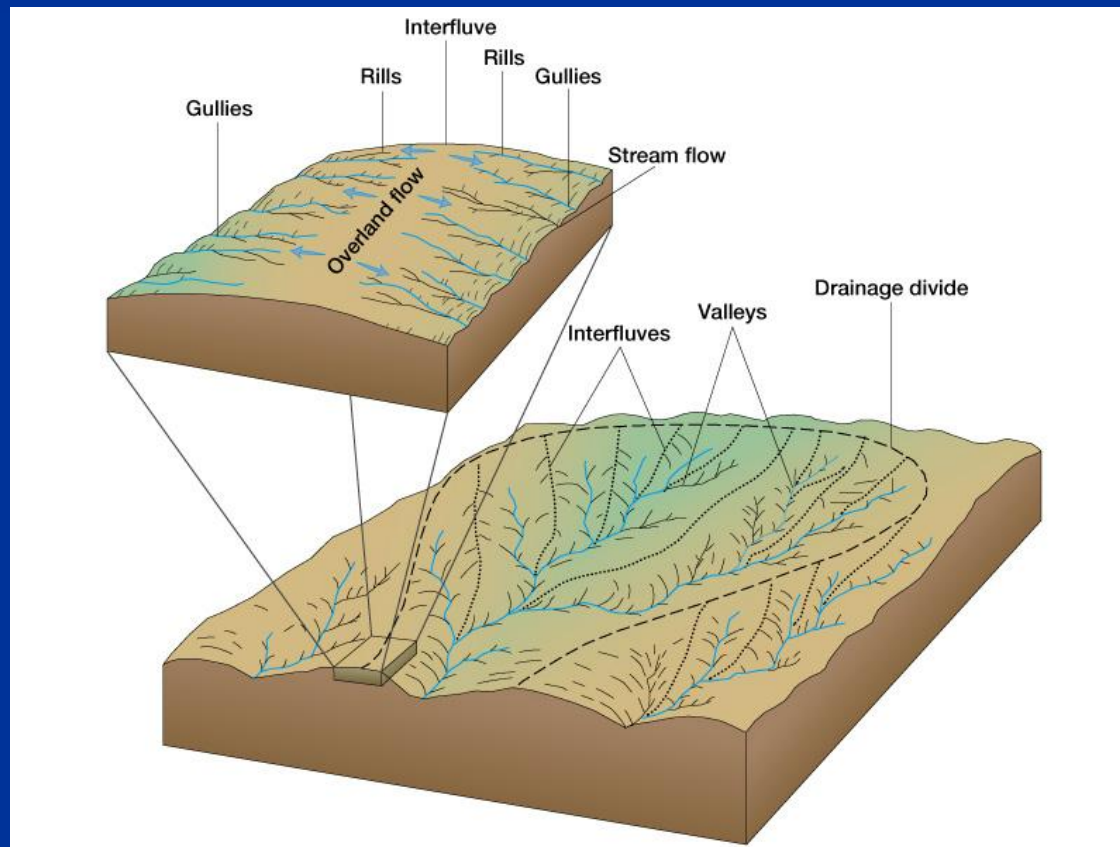
“[T]he wild water that lies upon the surface of the earth, or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel...fall within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above, and are absolute in the owner of the land...”

Taylor v. Fickas, 64 Ind. 167, 172 (1878).

B. Dispersed Water (Indiana Statute)

“Diffused surface water flowing vagrantly over the surface of the ground is not considered to be public water. The owner of the land on which the water falls, pools, or flows has the right to use the water.”

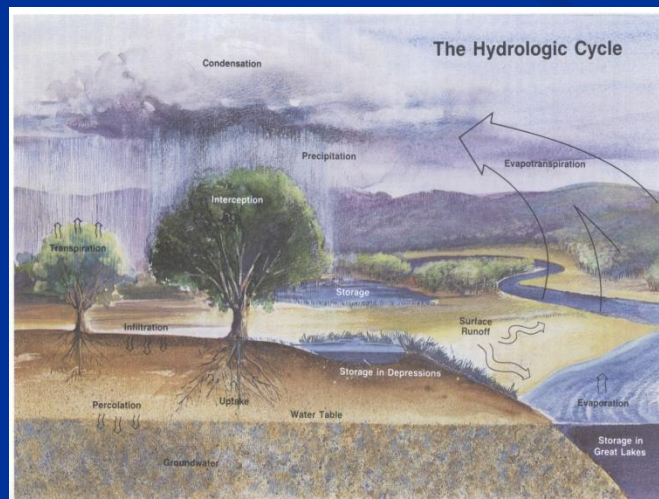
IC 14-25-1-2(b)



B. Dispersed Water (Common Enemy Doctrine)

With respect to the disposal of unwanted dispersed water, Indiana applies the “common enemy doctrine”. A landowner may lawfully accelerate or increase the flow of surface water by limiting or eliminating ground absorption or changing the grade of the land. But a landowner must not cast water upon a neighbor in unusual quantities that amplify force at a particular point.

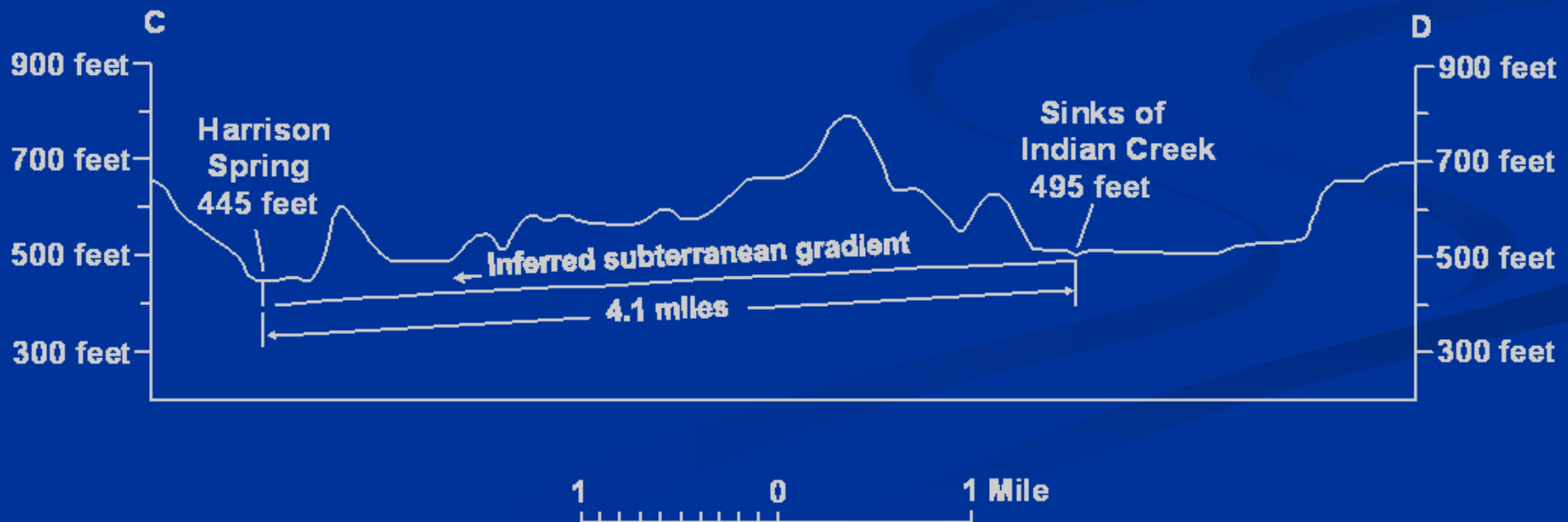
Argyelan v. Haviland, 435 N.E.2d 973 (Ind. 1982).



C. Underground Streams (Probably Same as Surface Water in Channels)

No reported Indiana decisions. Dictum suggests the same law applies (riparian doctrine) as applies to surface water in channels.

Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N.E. 849 (1904).



D. Percolating Ground Water (English Rule)

The early Indiana common law of percolating ground water is founded on the English Rule that “falls within that principle which gives to the owner of the soil all that lies beneath his surface....”

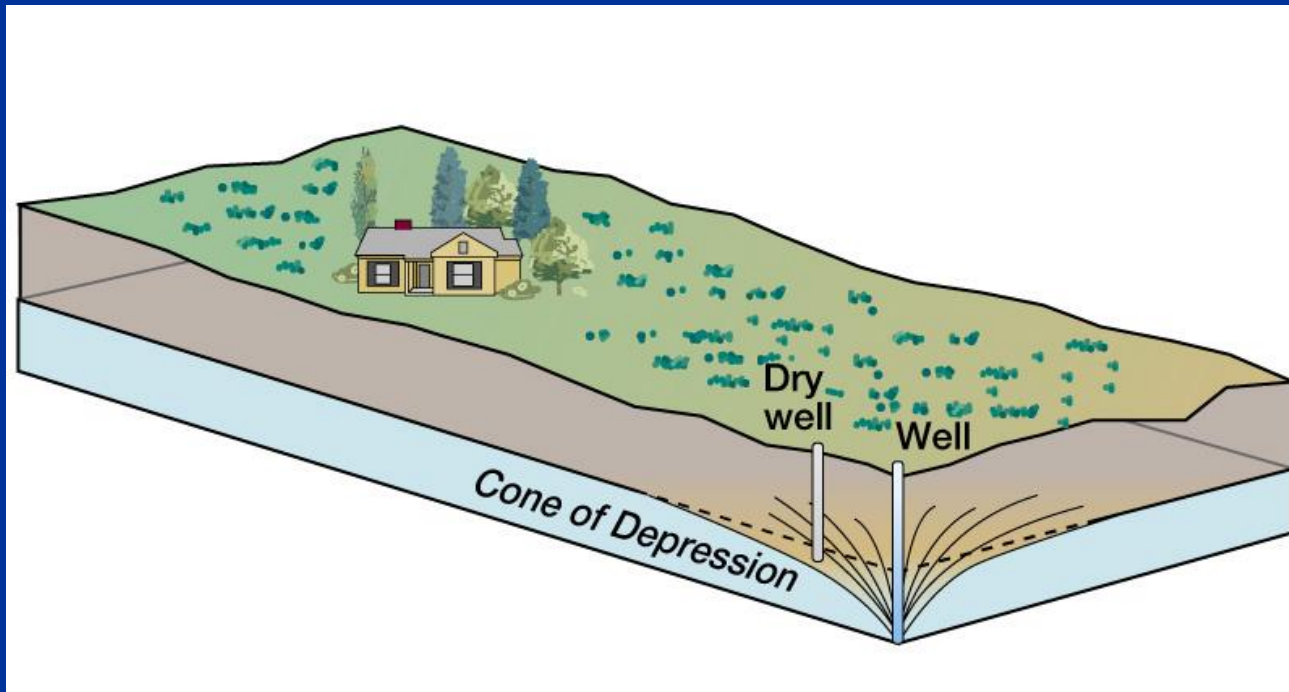
New Albany & Salem R.R. v. Peterson, 14 Ind. 112, 114 (1860).



D. Percolating Ground Water (Malicious Ground Water Diversions Prohibited)

“Where the diversion of the [ground] water is purely malicious, and is detrimental to another proprietor, it may be prevented by injunction.”

Gagnon v. French Lick Springs Hotel Co., at 72 N.E. 851.



D. Percolating Ground Water (Restatement Second of Torts REJECTED)

In 1983, the Restatement (Second) of Torts § 858 (1977) was posed by the Indiana Court of Appeals as the governing law of Indiana:

A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

- (a) the withdrawal of ground water unreasonably causes harm to a proprietor or neighboring land through lowering the water table or reducing artesian pressure,
- (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or
- (c) the withdrawal of ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

On appeal, the Indiana Supreme Court reversed and rejected the Restatement.

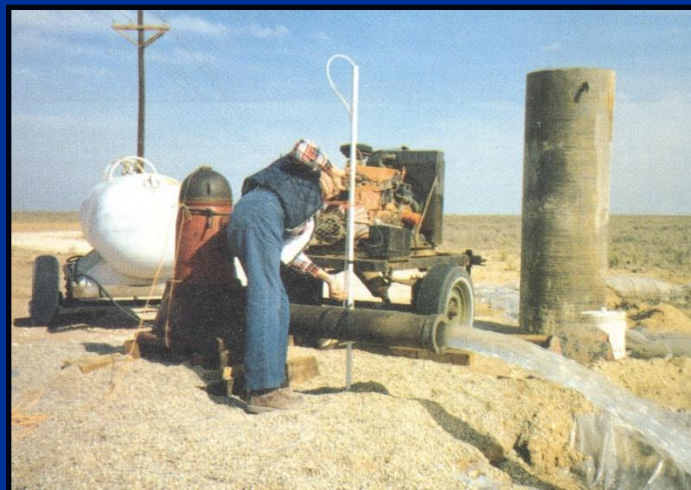
Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958 (Ind. 1983).

D. Percolating Ground Water (Common Law Based on English Rule Reaffirmed)

The Indiana Supreme Court generally reaffirmed common law based on the English Rule.

“Groundwater is part of the land in which it is present and belongs to the owner of that land.” Where a person uses or disposes of percolating groundwater for a beneficial purpose, damage that results to another is not actionable unless the damage is deliberate or gratuitous.

Wiggins v. Brazil Coal and Clay Corp. at 964.



D. Percolating Ground Water (Statutory Change to Common Law Affirmed)

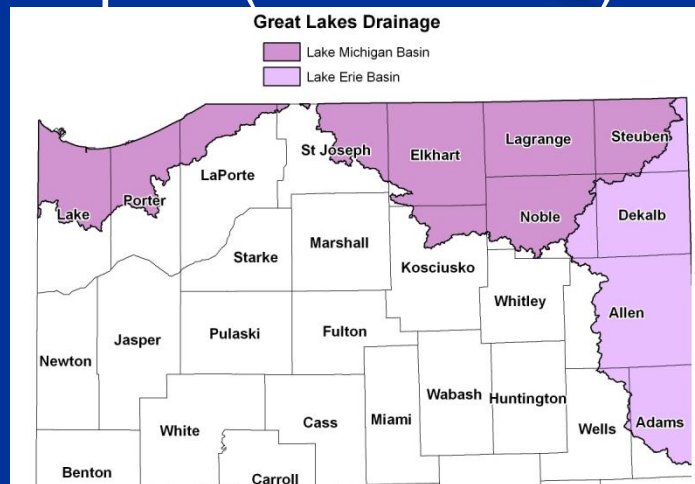
Within constitutional parameters, the Indiana General Assembly can modify the English Rule and the common law “doctrine of absolute use of ground water. The State can regulate the use of property without destroying rights in the property.”

Natural Resources Com’n v. Amax Coal Co., 638 N.E.2d 418, 429 (Ind. 1994).



D. Percolating Ground Water (Notable Indiana Statutes Modifying Common Law)

1. Water Rights in Ground Water (IC 14-25-3).
2. Emergency Regulation of Ground Water Rights (IC 14-25-4).
3. Water Resource Management (IC 14-25-7).
4. Great Lakes-St. Lawrence River Basin Water Resources Compact (IC 14-25-15).



Questions?

